Supreme Court, U.S.
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In The

Supreme Court of the United States

RICARDO ANTONIO WELCH, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Federal Torts Claim Act, 28 U.S.C. §§ 1346(b), 2671-2780, the United States expressly waives its sovereign immunity for the "wrongful act or omission" of a government employee "acting within the scope of his office or employment" where the United States, "if a private person, would be liable" under the law of the state "where the act or omission occurred." (Pet. App. at 24a.) This general waiver of sovereign immunity is subject to a number of exceptions. In particular, 28 U.S.C. § 2680(h) bars certain intentional tort claims against the United States. In 1974, however, Congress amended § 2680(h) to provide an "exception to the exception": When law enforcement officers commit certain intentional torts, the United States waives its sovereign immunity (the "law enforcement proviso"). Section 2680(a) contains general exceptions to the United States' waiver of sovereign immunity, including the discretionary function and due care provisions.

The questions presented are:

1. Whether a claim that falls squarely within Congress's specific waiver of sovereign immunity pursuant to the law enforcement proviso also must overcome § 2680(a)'s general exceptions?

2. Whether § 2680(a)'s due care provision bars all tort actions against the United States when a government actor properly follows the dictates of a mandatory statute, regardless of the resulting harm?

PARTIES TO THE PROCEEDING

Petitioner is Ricardo Antonio Welch, Jr. Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Ricardo Antonio Welch, Jr., respectfully petitions for a writ of *certiorari* to review the decision below of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-12a) is reported at 409 F.3d 646. The opinion of the United States District Court for the District of Maryland (Pet. App. 13a-21a) is reported at 316 F. Supp. 2d 252.

JURISDICTION

The opinion of the Court of Appeals was issued on May 31, 2005. An order denying a petition for rehearing and rehearing *en banc* was entered on July 26, 2005. (Pet. App. 22a-23a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680 *et seq.*, are set out in an appendix to this petition. (Pet. App. 24a-25a.)

STATEMENT OF THE CASE

1. The facts underlying this case are not disputed. The Petitioner, Ricardo Welch, is a longtime, legal permanent resident of the United States. Mr. Welch moved to the United States from Panama in 1978 at the age of ten, and has lived in Maryland for most of his life. After graduating from Bethesda High School in 1986, Mr. Welch joined the United States Navy. While in the Navy, Mr. Welch served on the U.S.S. Independence during the Panama crisis in the late 1980s. In 1990, Mr. Welch ceased active duty, but continued to serve in the Naval Reserve until he was honorably discharged in May 1994. Mr. Welch currently resides in Silver Spring, Maryland, with his wife and three children. Mr. Welch's wife, parents, two of his three siblings and all three children are citizens of the United States. Mr. Welch has worked at the same Maryland company, Livingston Fire Protection, Inc., almost continuously for the past decade.

2. In August 1997, on the basis of Mr. Welch's guilty plea to certain state charges stemming from a 1993 altercation, an immigration judge ordered Mr. Welch deported. As a result, on October 14, 1998, Immigration and Naturalization Service ("INS") officials detained Mr. Welch pursuant to a final order of deportation. On April 22, 1999, the convictions underlying the deportation order were vacated, yet the INS continued to detain Mr. Welch pursuant to Section 236(c) of the Immigration and Naturalization Act ("INA § 236(c)") (codified at 8 U.S.C. § 1226(c)(1)(B)). INA § 236(c) mandates that the INS take into custody and indefinitely jail any alien who is deportable for certain violations while providing no opportunity for a bail hearing.

3. On September 14, 1999, Mr. Welch filed a petition for a writ of *habeas corpus*, demanding not his release, but only that the immigration court provide him the opportunity to prove he was bailable. On June 6, 2000, the United States District Court for the District of Maryland held that INA § 236(c)'s no-bail provision violated Mr. Welch's constitutional rights because it failed to provide for an individualized bail hearing. *See Welch v. Reno*, 101 F. Supp. 2d 347, 356 (D. Md. 2000), *aff'd*, *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002). Pursuant to the District Court's order, on June 16, 2000, an immigration judge provided Mr. Welch a bail hearing and granted bail, determining that Mr. Welch was neither a flight risk nor a danger to the community.[1] At the time Mr. Welch was released on bail, he had been jailed against his will and without lawful justification for 422 days.

4. On June 19, 2002, the United States Court of Appeals for the Fourth Circuit held that INA § 236(c) was unconstitutional as applied to Mr. Welch. *Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) ("*Welch I*"). The Fourth Circuit held that INA § 236(c)'s mandatory detention provision, which failed to afford Mr. Welch a bail hearing, violated Mr. Welch's Fifth Amendment substantive due process rights. The *Welch I* court further concluded that "[f]ourteen months of incarceration *pendente lite* of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights as in criminal proceedings, together lead [the court]

[1] Despite opposing Mr. Welch's bail request, the United States did not call any witnesses at the bail hearing, nor did the United States appeal the immigration court's decision to grant bail.

to conclude that the circumstances of Welch's detention constitute punishment without trial." *Id.*[3]

5. While the *Welch I* decision was pending, the United States urged this Court to grant *certiorari* review of the decisions of three other Courts of Appeals regarding the constitutionality of INA § 236(c). Before this Court made its *certiorari* decision in those other cases, the Solicitor General informed this Court on June 20, 2002, of the newly-decided *Welch I* opinion. The Solicitor, however, affirmatively chose not to petition for *certiorari* review of the *Welch I* decision. In the United States' merits brief, moreover, the Solicitor General suggested that Mr. Welch's as-applied challenge to INA § 236(c) was appropriate. *See* Brief for the Petitioners at 48-49, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491) (citing the Fourth Circuit's decision in *Welch I*). On April 29, 2003, this Court issued its decision in *Demore*, holding INA § 236(c) facially constitutional. *Demore v. Kim*, 538 U.S. 510, 531 (2003). However, because the Fourth Circuit decision is an as-applied decision, *Welch I* "remains the final authoritative ruling" with respect to Mr. Welch. (Pet. App. at 15a.)

6. On June 4, 2002, Mr. Welch filed a timely administrative claim against the United States, pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b),

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[3] In *Welch I*, the United States did not challenge the district court's ruling that the INS's attempt to apply the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-3546 (1996) to his deportation proceedings violated Mr. Welch's equal protection rights. *See Welch v. Reno*, 2000 WL 1481426, at *3 (D. Md. September 20, 2000). Similarly, after an immigration court granted Mr. Welch's application for cancellation of his removal proceedings in July 2002, the United States did not appeal.